

**STATE BOARD OF EQUALIZATION**

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June 11, 1999

E. L. SORENSEN, JR.  
Executive Director

Mr. D--- L--- Y---g  
W. D. Y--- & Sons  
XXXXX --- Street  
---, CA XXXXX

**Re: SS --- XX-XXXXXX**  
Date Palms and Palm Trees  
Sold for Landscaping

Dear Mr. Y---:

Your letter of January 25, 1999, has been referred to the Legal Division for a response. You indicate that you sell date palms and other varieties of palm trees for landscaping purposes. You ask if, in the wake of the recent amendments to Revenue and Taxation Code Section 6358, sales of such trees are now exempt from tax.

OPINION

A. Sales and Use Tax Generally.

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes a sales tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) "[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale ..." (§ 6091.) "Exemptions from taxation must be found in the statute." (Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.App.2d 87, 96 [290 P.2d 201.]) "The taxpayer has the burden of showing that he clearly comes within the exemption." (Standard Oil Co. v. St. Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rptr. 571].)

B. Sales of Palm Trees and Date Palms.

As you know, prior to the enactment of Section 5 of AB 2798 (Stats. 1998, Ch. 323), the exemption from sales and use tax for sales of plants the products of which ordinarily constitute food for human consumption was limited to non-annual plants. The amendment to section 6358(c)

removed that restriction. Consequently, sales of qualifying perennial, as well as annual, plants are, operative January 1, 1999, exempt from tax.

We have not examined the phrase “the products of which constitute food for human consumption” in the context of plants. In the case of animals, however, the exemption granted in section 6358(b) uses the same terminology. In that context, we have previously determined that the sale of a qualified animal is not subject to tax, even if the animal is being sold for some other purpose than as food for human consumption - e.g., sales to educational institutions for research. (Annot. 110.0060 (3/5/70). Sales and Use Tax Annotations are excerpts from previous Board staff opinion letters and serve as guides to staff positions.) Because the Legislature used the same language regarding plants, we conclude that it intended that the same analysis apply. Accordingly, if the plant being sold is of a kind the products of which ordinarily constitute food for human consumption, then its sale for landscaping purposes would come within the exemption under the above analysis.

The next question, then, is whether or not the products of the trees about which you inquire “ordinarily” constitute food for human consumption. In determining whether or not those products qualify, they must be in fact generally used as food for human consumption in the area where they happen to be located. (See, e.g., Annot. 110.0005 (4/18/73).) Dates are a common food for human consumption; sales of date palms for landscaping purposes would be exempt from tax under AB 2798 but only if such trees produce edible dates. If they are a fruitless variety or the dates they produce either cannot be eaten or are not generally eaten in the area in which they happen to be located, their sales remain subject to tax. Regarding other kinds of palms, you indicate that they will produce palm hearts which “are available in any grocery store” and “are generally used in salads or in appetizers.” Based on the information you supply, it appears that palm hearts “ordinarily constitute food for human consumption” with the result that sales of palm trees which produce edible palm hearts, with the same provisos as to date palms, are, since the enactment of AB 2798, not subject to tax even if sold for non-food purposes such as landscaping.

I hope the above discussion has answered your question. If you need anything further, please do not hesitate to write again.

Sincerely,

John L. Waid  
Senior Tax Counsel

JLW:sr

cc: Mr. Jeffrey D. Navalta (MIC:40)